

04-91

No. \_\_\_\_\_

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**In the  
Supreme Court of the United States**

MARC D. MEZIBOV,

*Petitioner,*

v.

MICHAEL K. ALLEN; HAMILTON COUNTY OHIO,

*Respondents.*

**On Petition for a Writ of Certiorari to the United  
States Court of Appeals for the Sixth Circuit**

**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

The Sixth Circuit affirmed the dismissal of a complaint filed pursuant to 42 U.S.C. § 1983 by Petitioner Marc Mezibov, an attorney, who alleged that the Hamilton County (Ohio) Prosecutor, the County's highest elected law enforcement official, retaliated against him because of Petitioner's vigorous in-court defense of a client. In doing so, the Court of Appeals held that "in the context of the courtroom proceedings, *an attorney retains no personal First Amendment rights* when representing his client in those proceedings." (Emphasis added). *Mezibov v. Allen*, 411 F. 3d 712, 720-721 (6<sup>th</sup> Cir. 2005). The retaliation took the form of out-of-court statements by the Prosecutor in newspaper and television media statements, designed and intended to harm Mr. Mezibov, retaliate against him for his vigorous defense of a criminal defendant, and to chill Mr. Mezibov and other criminal defense attorneys from undertaking such vigorous defenses in future cases. The highly publicized retaliatory conduct of the Prosecutor included defaming Petitioner by releasing statements to the media that Petitioner violated his ethical duty to his client by selling out the interests of his client to further his own interest; and that through Petitioner's unethical conduct and incompetent representation, Petitioner's client was convicted and faced the loss of his medical license.

Two questions are presented:

1. Are attorneys deprived of all First Amendment protection with regard to the representation of clients in court proceedings?
2. Whether certiorari should be granted to resolve the split among the circuit courts as to whether a criminal defense

attorney must plead and prove that he was actually chilled by a government official's retaliatory conduct for the lawyer's in-court speech in order to pursue a First Amendment retaliation claim?

## **LIST OF PARTIES**

The parties to this Petition are Marc D. Mezibov, Petitioner; Michael Allen, in his individual and official capacity as Hamilton County Prosecutor; and Hamilton County, Ohio.

## **CORPORATE DISCLOSURE**

No party hereto is a publicly-owned corporation or a subsidiary or affiliate of a publicly-owned corporation. There is no publicly-owned corporation, not a party to the appeal, that has a financial interest in the outcome of this Petition.

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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at *Mezibov v. Allen*, 411 F.3d 712 (6<sup>th</sup> Cir. 2005). The Sixth Circuit affirmed the decision of the District Court, that dismissed Marc Mezibov's complaint. (Appendix D).

## STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.C. § 1254(1). The Sixth Circuit's decision was rendered on June 16, 2005. (Appendix A). The Petition for Rehearing with Suggestion for Rehearing *En Banc* was denied on September 29, 2005. (Appendix B).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### Amendment I to the United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

### 42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and

laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

### STATEMENT OF THE CASE

Petitioner Marc D. Mezibov is an attorney licensed to practice law in the states of Ohio and New Jersey. Petitioner was retained by Dr. Jonathan Tobias to represent him regarding a 26-count indictment in Hamilton County Common Pleas Court. The indictment alleged that Dr. Tobias, while working for the Hamilton County Coroner's Office, allowed a photographer to take unauthorized photographs of corpses at the Hamilton County Morgue. At trial, Dr. Tobias was acquitted on 24 of the 26 counts. (Complaint, ¶¶ 8-11). The remaining two counts were ordered dismissed for lack of evidence by the Court of Appeals and Dr. Tobias was "discharge[d] from further prosecution." *State of Ohio v. Tobias*, Hamilton App. No. (-020261, 2003-Ohio-2336, ¶¶ 36-38).

The case attracted a substantial amount of publicity. In the course of his representation, Mr. Mezibov filed three motions in the Court of Common Pleas on behalf of Dr. Tobias that addressed inappropriate conduct by the Hamilton County Prosecutor's Office and a potential conflict of interest on the part of that office. (Complaint, ¶ 10). It was in response to the filing of those motions and the pursuit of a vigorous defense of his client by Mr. Mezibov that Respondent Allen, as Hamilton County Prosecutor, retaliated against Mr. Mezibov by making false statements to the media intended to chill Mr. Mezibov and other criminal defense

attorneys from such vigorous defenses in the future. Defendant Allen's retaliatory conduct included Allen's statements, published in the local media, that Mr. Mezibov acted in an unethical and incompetent fashion in his defense of Dr. Tobias, and that Petitioner purposely compromised the interest of his client to advance his own personal agenda. The Complaint alleges that Allen knew the statements to be untrue at the time they were made. (Complain, ¶¶ 15-24).

Mr. Mezibov alleges that Defendants engaged in a malicious and purposeful campaign to retaliate against Petitioner by falsely smearing his reputation because of Petitioner's lawful advocacy of the rights and interests of his client. (Complaint, ¶¶ 1-2).

The complaint focuses on the retaliatory nature of the Prosecutor's conduct as evidenced by the following allegations:

12. Within moments of the jury's verdict, Defendant Allen began a purposeful campaign to publicly defame, ridicule and vilify Mr. Mezibov in retaliation for the defenses he raised in his legal motions filed with the . . . Court of Common Pleas on behalf of his client, Dr. Tobias. For example, . . . , Defendant Allen released a statement . . . in which he stated: "Obviously, this [Mr. Mezibov] is a man who doesn't try too many cases and the verdict shows that. If I were Dr. Tobias, I would ask for my money back." "Real criminal defense attorneys, . . . , don't do that. They don't throw mud . . . . Obviously it backfired . . . ." Defendant Allen's statements were intended to and did depict Mr. Mezibov as an unethical, incompetent and unprincipled attorney.